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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

KAREN WITHEM, Plaintiff and Appellant, v. RON ROGERS & ASSOCIATES, Defendant and Respondent.	B204034 (Los Angeles County Super. Ct. No. BC322619)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard L. Fruin, Judge. Affirmed in part, Reversed in part and Remanded.

Law Office of Jerry L. Webb and Jerry L. Webb for Plaintiff and Appellant.

Walsh & Associates, Adam N. Bouayad and Dennis J. Walsh for Defendant and Respondent.

In June 2000, defendant Ron Rogers & Associates, a public relations firm, hired plaintiff Karen Withem as an account supervisor. In July 2001, plaintiff began to experience a series of health problems -- mononucleosis, followed by fibromyalgia and chronic fatigue/immune deficiency syndrome. The parties dispute the extent to which plaintiff sought accommodation for her disability and whether any accommodation was available. Ultimately, in June 2002, plaintiff took a 12-week medical leave under the California Family Rights Act ("CFRA," Gov. Code, § 12945.2).[1] When her leave expired, defendant laid her off -- according to defendant, as part of a workforce reduction related to a downturn in business, according to plaintiff, as part of a pattern of disability discrimination.

Plaintiff sued defendant, alleging three violations of the California Fair Employment and Housing Act ("FEHA," § 12940, et seq.): disability discrimination, failure to reasonably accommodate her disability, and failure to engage in an interactive process to seek a reasonable accommodation (§ 12940, subds. (a), (m), and (n) respectively). She also alleged claims for violation of the CFRA, and for intentional and negligent infliction of emotional distress. The trial court granted defendant's motion for summary judgment, and now plaintiff appeals.

We affirm the trial court's ruling as to plaintiff's CFRA claim in its entirety. As to her remaining claims, we affirm to the extent they depend on a violation of defendant's duties under section 12940, subdivisions (a), (m), and (n) after plaintiff began her medical leave in June 2002. We reverse to the extent those claims depend on a violation of those duties before plaintiff began her June 2002 medical leave.

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[1] All undesignated section references are to the Government Code.

PROCEDURAL AND FACTUAL BACKGROUND

1. *Plaintiff's Complaint*[2]

In her complaint, plaintiff alleged that she was hired by defendant in June 2000 as an account supervisor, and that in July 2001, she began to experience fatigue. Diagnosed with mononucleosis, she requested to work at home one day a week, but defendant refused.

Plaintiff's health deteriorated because of the failure to accommodate. In February 2002, she met with defendant's president to discuss a reasonable accommodation for her continued fatigue. Plaintiff suggested that she could become an independent contractor with set hours, or that she be assigned to a position with less pressure. Defendant denied these requests without discussion.

Plaintiff's health continued to deteriorate because of defendant's failure to accommodate her disability. In May 2002, plaintiff was diagnosed with fibromyalgia and chronic fatigue/immune deficiency syndrome, and later with lupus. Her physician prescribed a period off work and complete rest. Defendant granted plaintiff's request for medical leave in June 2002. Defendant's president, however, stated that defendant would do only what the law required and would not hold plaintiff's job open. Before taking medical leave, plaintiff's supervisor had told her that her performance was above average and that the supervisor recommended a pay raise. Subsequently, defendant denied the pay raise.

In July and August 2002, plaintiff's supervisor, citing an abundance of work, called plaintiff several times at plaintiff's home asking to know when plaintiff could return to work. Plaintiff agreed to come back part-time or working from

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[2] The operative pleading is plaintiff's first amended complaint. For simplicity we refer to it as the complaint.

home one day a week. On August 28, 2002, defendant terminated plaintiff. The stated reason was insufficient work.

On March 5, 2003, plaintiff filed a complaint with the California Department of Fair Employment and Housing ("DFEH") based on disability discrimination and violation of the CFRA. On March 5, 2004, DFEH issued a right to sue letter.

Plaintiff alleged six causes of action: (1) disability discrimination (§ 12940, subd. (a)), (2) failure to make a reasonable accommodation (§ 12940, subd. (m)), (3) failure to engage in an interactive process to find a reasonable accommodation (§ 12940, subd. (n)), (4) violation of the CFRA (§ 12945.2, subd. (a)), (5) intentional infliction of emotional distress, and (6) negligent infliction of emotional distress.

Plaintiff's disability discrimination claim, and her claims for failure to accommodate and failure to engage in an interactive process, relied on defendant's alleged conduct during two separable periods of time. The first related to defendant's alleged failure to grant her requests for accommodation in July 2001 and February 2002, leading to her having to take medical leave under the CFRA in June 2002 for fibromyalgia and chronic fatigue/immune deficiency syndrome. The second related to defendant's alleged denial of her requests for accommodation in July and August 2002 while she was on medical leave, and defendant's terminating her. Plaintiff's CFRA claim related to defendant's terminating her following her medical leave rather than allowing her to return to work. The emotional distress claims depended on defendant's alleged violations of the FEHA and CFRA.

2. *Summary Judgment Proceedings*

Defendant moved for summary judgment, or in the alternative summary adjudication.[3] As to plaintiff's disability discrimination claim, defendant contended that plaintiff had failed to exhaust her administrative remedy under the FEHA, that plaintiff was not a qualified individual when she was discharged, and that defendant had a legitimate, nondiscriminatory reason for her termination. To defeat plaintiff's claims for failure to accommodate and failure to engage in an interactive process, defendant repeated its arguments that plaintiff failed to exhaust her administrative remedy and was not a qualified individual when she was terminated. Defendant also argued that plaintiff's requested accommodation of working from home would cause an undue hardship.

Regarding plaintiff's CFRA claim, defendant contended that plaintiff received the medical leave to which she was entitled, that she was not a qualified individual when she was terminated, and that defendant had a legitimate, nondiscriminatory reason for terminating her. Finally, defendant contended that

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[3] Defendant actually made two motions for summary judgment. In ruling on the first motion, the court granted summary adjudication against plaintiff on a single issue, concluding that plaintiff was not a qualified individual because she could not perform the essential functions of her job with or without an accommodation. The court expressed uncertainty, however, as to whether this ruling defeated all plaintiff's claims. The court also noted that in its reply to plaintiff's opposition, defendant had produced evidence showing that plaintiff was terminated because of a downturn in defendant's business and a related work force reduction. Yet, because that evidence was presented in the reply, the court could not grant summary adjudication or summary judgment on that basis. The court ordered the parties to appear for a further hearing to discuss the court's concerns. Subsequently, defendant filed a second summary judgment motion nearly identical to the original motion. On that motion, the court granted summary judgment.

In their discussion of the issues on appeal, the parties do not distinguish between the two motions. We take our summary of the evidence and arguments from the second, dispositive motion.

because plaintiff's FEHA and CFRA claims failed, her emotional distress claims could not stand.

Defendant's evidence in support of these arguments, and plaintiff's evidence in opposition, will be discussed in our resolution of the issues on appeal, below. The trial court granted the motion for summary judgment. On the first cause of action for disability discrimination, the court concluded: (1) plaintiff was not a qualified individual because she was medically unable to return to work following her CFRA medical leave; (2) defendant had a legitimate, non-discriminatory reason for terminating plaintiff – a work force reduction, and (3) plaintiff had failed to include a claim for denial of reasonable accommodation or failure to engage in an interactive process in her DFEH complaint, and that the claims (alleged to have arisen in July 2001 and February 2002) were barred by the statute of limitations. Similarly, on plaintiff's accommodation claims, the court found a failure to exhaust administrative remedies. On plaintiff's CFRA claim, the court determined that plaintiff had not been cleared to return to work and that defendant had a legitimate nondiscriminatory reason for terminating her. Finally, the court summarily adjudicated the emotional distress claims because they could not stand in the absence of the employment claims.

DISCUSSION

We review the grant of summary judgment under settled principles. A defendant moving for summary judgment bears an initial burden of production to make a prima facie showing that one or more elements of the cause of action cannot be established, or that there is a complete defense. The defendant may sustain this burden by showing that the plaintiff does not have, and cannot reasonably obtain, evidence to prove one or more elements of the cause of action by a preponderance of the evidence. If defendant succeeds, the burden of

production shifts to the plaintiff to make a prima facie showing that a triable issue of material fact exists as to the cause of action. (See *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851 (*Aguilar*).) In determining whether a triable issue of material fact exists, we strictly construe the moving party's papers. However, the opposing party's evidence must be liberally construed to determine the existence of a triable issue of fact. "All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment." (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562; see *Aguilar, supra*, 25 Cal.4th at p. 843.)

We begin by analyzing the trial court's ruling as to plaintiff's claims for failure to reasonably accommodate and failure to engage in an interactive process.

1. *The Accommodation Claims*

Plaintiff's second cause of action alleged a failure to reasonably accommodate her disability (§ 12940, subd. (m)); her third cause of action alleged a failure to engage in an interactive process to find a reasonable accommodation. For ease of reference, we refer to these claims collectively as plaintiff's accommodation claims.

The accommodation claims rely on statutory bases of liability distinct from plaintiff's disability discrimination claim under section 12940, subdivision (a), which we discuss, *infra*. (See *Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 357 (*Bagatti*) [referring to subd. (m)]; *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 256 [referring to former subd. (k), now subd. (m)].) Section 12940, subdivision (m), makes it an unlawful employment practice for an employer "to fail to make reasonable accommodation for the known physical or mental disability of an . . . employee." Subdivision (n) makes it an unlawful practice "to fail to engage in a timely, good faith, interactive process with

the employee . . . to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee . . . with a known physical or mental disability or known medical condition."

As we have explained, plaintiff's accommodation claims actually encompass two distinct periods. The first involves defendant's alleged violation of its duties under section 12940, subdivisions (m) and (n), by denying her accommodation requests without meaningful interaction in July 2001 and February 2002, leading to her need for medical leave under the CFRA in June 2002. The second involves defendant's alleged violation of these duties by denying her accommodation requests while she was on medical leave and thereafter terminating her.

The trial court summarily adjudicated plaintiff's accommodation claims in their entirety on the ground that plaintiff failed to exhaust her administrative remedies. The court ruled that plaintiff had failed to include her accommodation claims in her DFEH complaint, and that the alleged failure to accommodate in July 2001 and February 2002 were time barred.

Plaintiff contends that she raised a triable issue whether she exhausted her accommodation claims under the "like or reasonably related" doctrine (*Sandhu v. Lockheed Missiles & Space Co.* (1994) 26 Cal.App.4th 846, 859 (*Sandhu*)), and whether the alleged failures to accommodate in July 2001 and February 2002 were timely under the "continuing violations" doctrine (see *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823 (*Richards*).) We agree.

However, to the extent plaintiff's accommodation claims allege violations of defendant's duties under section 12940, subdivisions (m) and (n), during and after her medical leave, plaintiff failed to raise a triable issue whether she could have performed the essential duties of her job with a reasonable accommodation. Therefore, the trial court properly adjudicated that portion of the accommodation claims in favor of defendant. To the extent the accommodation claims rest on

defendant's failures to accommodate and interact before plaintiff took medical leave in June 2002, we conclude that the claims remain viable.

a. *Exhaustion of FEHA Administrative Remedy – "Like or Reasonably Related" Doctrine*

Before an employee may sue for violations of the FEHA, the employee must exhaust his or her administrative remedy by filing a complaint with the DFEH. (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 492; see § 12960, subds. (b) & (d).) The complaint must be verified and in writing, and "shall set forth the particulars [of the alleged unlawful conduct] and contain other information as may be required by the department." (§ 12960, subd. (b).) With certain exceptions, the complaint must be filed within one year after the alleged violation occurred. (§ 12960, subd. (d).) Plaintiff has the burden of proving administrative exhaustion. (*Holland v. Union Pacific Railroad Co.* (2007) 154 Cal.App.4th 940, 945 (*Holland*).)

Here, defendant's evidence shifted the burden of production to plaintiff to show that she exhausted her administrative remedy as to her accommodation claims. Defendant produced the verified complaint plaintiff filed with the DFEH on March 5, 2003. In that complaint, plaintiff did not allege a failure to reasonably accommodate or a failure to engage in an interactive process. She alleged, rather, denial of medical leave under the CFRA and disability discrimination. In pertinent part, her DFEH complaint showed that she checked the box for disability discrimination. Although there was no box for failure to accommodate or failure to engage in an interactive process, there was a box allowing for a description of discrimination not listed. Plaintiff left that box blank.

In the portion of the form allowing for specific allegations, plaintiff stated that "[o]n or about August 28, 2002, I was denied a medical leave under the

[CFRA] and I was denied return to my position of Accounting Supervisor and I was also advised that I was being laid off. . . . I believe that I was denied return to my position because of my disability (Fibromyalgia) and because the employer perceived my disability as a future risk." She based her belief on the fact that her 12-week medical leave under the CFRA would expire on September 4, 2002, but on August 28, 2002, she was told by defendant's president, Lynne Doll, that she was being laid off.

Defendant also produced a copy of a letter to plaintiff dated February 19, 2004, from the DFEH consultant who investigated plaintiff's complaint.[4] The investigation encompassed only plaintiff's allegations of denial of leave under CFRA and disability discrimination relating to defendant's failure to permit plaintiff to return to work following her leave. The investigation found insufficient evidence to support the claims.

Responding to defendant's showing, plaintiff contends on appeal, in part, that she adequately exhausted her administrative remedy under the so-called "like or reasonably related" standard. (See *Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1615-1617 (*Okoli*); *Sandhu, supra,* 26 Cal.App.4th at p. 859.)[5] Under this test, the employee is deemed to have exhausted a claim not

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[4] Under section 12963, the DFEH must make a "prompt investigation" of "any complaint alleging facts sufficient to constitute a violation" of the FEHA.

[5] For this and other propositions, appellant repeatedly cites *Williams v. Genentech, Inc.*, formerly found at 139 Cal.App.4th 357. On August 23, 2006, more than 22 months before appellant's opening brief was filed, the California Supreme Court granted review in *Williams* (see 49 Cal.Rptr.3d 210). On December 19, 2007, the court dismissed review and remanded the case to the Court of Appeal in light of *Green v. State of California* (2007) 42 Cal.4th 254. Because the *Williams* opinion is no longer published, it cannot be cited as authority. (Cal. Rules of Court, rule 8.1115(a); see *Barber v. Superior Court* (1991) 234 Cal.App.3d 1076, 1082.)

pled in the DFEH complaint if the claim is like or reasonably related to one that is pled, such that it is reasonably likely the DFEH investigation would uncover the non-pled claim. (See *Okoli, supra,* 36 Cal.App.4th at p. 1615.) We agree that plaintiff raised a triable issue whether she exhausted her accommodation claims under this standard.

First, plaintiff produced competent evidence (a declaration from her counsel, James A. Otto, who was a qualified witness on the subject) that the form complaint provided by the DFEH did not contain separate boxes for accommodation claims because the DFEH considered such claims to be subsumed in a disability discrimination claim. Plaintiff's counsel stated that from 1995 through 2002 he was a staff counsel for the DFEH and was familiar with how complaints are processed and investigated. He stated that the DFEH considered disability accommodation claims to be subsumed in disability discrimination claims based on section 12940, subdivisions (a)(1) and (a)(2), and *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950-951. In substance, section 12940, subdivisions (a)(1) and (a)(2), permit an employer to refuse to hire or to discharge a disabled employee who cannot perform the essential duties of the job even with reasonable accommodation. *Prilliman* reasoned that an employer has an affirmative duty to investigate reasonable accommodations for a known disabled employee and to offer them, so long as it is not an undue hardship for the employer.[6]

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[6] *Prilliman* held that "an employer who knows of the disability of an employee has an affirmative duty to make known to the employee other suitable job opportunities with the employer and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a

Plaintiff also produced circumstantial evidence that tended to corroborate her counsel's assertion, namely, that she had complained to the DFEH about defendant's failure to accommodate her, but the formal DFEH complaint, drafted for her by a DFEH consultant, mentioned disability discrimination but not a failure to accommodate. Theresa Satterfield, the acting District Administrator for District "S" of the DFEH, filed a declaration in support of plaintiff's opposition to summary judgment. According to Satterfield, when a person files a complaint with the DFEH, he or she must complete a pre-complaint questionnaire and a supplement to the pre-complaint questionnaire. After these documents are filed, the formal complaint is drafted by a DFEH consultant to be reviewed and verified by the complaining person. During the investigation, the complainant may request that the complaint be amended or corrected, and the District Administrator may grant such requests. The verified complaint forms the basis of the investigation and is used by the consultant to identify the issues to be investigated.

Attached to Satterfield's declaration were copies of plaintiff's verified DFEH complaint, her pre-complaint questionnaire, a supplemental pre-complaint questionnaire, and notes taken by the intake consultant. A portion of the pre-complaint questionnaire directs the complainant to circle the alleged discriminatory treatment and state the dates it occurred. Plaintiff circled "Terminated/Laid Off" and wrote the date as "9/5/02." She also circled "Denied Accommodation" and wrote the date as "6/01-6/02." Plaintiff wrote that she had "asked to limit hours or work at home 1 day a week or change teams over the next year. Was denied although others who were healthy were given these accommodations." In her supplement to the pre-complaint questionnaire, plaintiff wrote that she had been

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policy of offering such assistance or benefit to any other employees." (*Id.* at pp. 950-951.)

"denied accommodation" and "terminated." The notes taken by the intake consultant to whom plaintiff spoke also reflected that plaintiff had complained that she was "denied accommodation." A reasonable trier of fact could infer that even though plaintiff repeatedly referred to a failure to accommodate, the reason the formal DFEH complaint drafted for plaintiff did not specifically refer to plaintiff's accommodation claims was because the DFEH deemed them to be subsumed in the disability discrimination claim.[7]

Moreover, in amplifying on her disability discrimination claim in the DFEH complaint, plaintiff specifically alleged that she believed she "was denied return to my position because of my disability . . . and because the employer perceived my disability as a future risk." A reasonable trier of fact could infer that if, as plaintiff alleged, her employer believed her disability was a future risk, the reason was that the employer did not want to accommodate her disability upon her return. A reasonable trier of fact could also infer that in investigating this allegation, the DFEH would likely consider evidence relating to the nature of plaintiff's disability, when it arose, how the employer handled it during her employment, whether the employer discussed with her the possibility of an accommodation, and whether such an accommodation existed. That the investigation ultimately conducted by the DFEH did not consider such questions is not determinative whether the DFEH

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[7] We do not mean to suggest that information given in precomplaint questionnaires are a substitute for allegations in the verified DFEH complaint for the purpose of administrative exhaustion. (See *Cole v. Antelope Valley Union High School Dist.* (1996) 47 Cal.App.4th 1505, 1515 [referring to persons alleged to have discriminated against plaintiff in letter to DFEH, but not referring to them in DFEH complaint, insufficient to exhaust administrative remedy as to such persons].) We cite the evidence from documents relating to plaintiff's pre-complaint consultation with the DFEH only as circumstantial evidence tending to corroborate her attorney's declaration that the DFEH considered accommodation claims to be encompassed by disability discrimination claims.

complaint, as filed, was sufficient to encompass the accommodation claims for purposes of exhaustion under the "like or reasonably related" doctrine.

Thus, we conclude that plaintiff's evidence raised a triable issue as to whether her accommodation claims were included in her DFEH complaint under the like or reasonably related doctrine.

b. *Exhaustion of FEHA Administrative Remedy -- Continuing Violation Doctrine*

As noted, the trial court found a second flaw in plaintiff's accommodation claims – that the failures to accommodate in July 2001 and February 2002 alleged in the complaint were time barred, because they occurred more than one year before plaintiff filed her DFEH complaint on March 5, 2003. Plaintiff contends, and we agree, that she raised a triable issue whether the continuing violations doctrine applies so as to make the allegations of conduct in July 2001 and February 2002 timely.

The continuing violation rule is an exception to the one-year limitation period. (*Holland, supra,* 154 Cal.App.4th at p. 946.) It applies when the employee bases a FEHA claim on conduct that occurred in part within and in part outside the one-year period before the DFEH complaint was filed.

For conduct outside the one-year period to be considered timely under the continuing violation doctrine, plaintiff must produce evidence meeting three conditions. As explained by the California Supreme Court in *Richards, supra*, 26 Cal.4th at page 823, "an employer's persistent failure to reasonably accommodate a disability . . . is a continuing violation if the employer's unlawful actions are (1) sufficiently similar in kind--recognizing, as this case illustrates, that similar kinds of unlawful employer conduct, such as acts of harassment or failures to reasonably accommodate disability, may take a number of different forms [citation]; (2) have

occurred with reasonable frequency; (3) and have not acquired a degree of permanence. [Citation.] But consistent with our case law and with the statutory objectives of the FEHA, we further hold that 'permanence' in the context of an ongoing process of accommodation of disability . . . should properly be understood to mean the following: that an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile." (See also *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1059.)

Here, plaintiff filed a declaration in opposition to summary judgment in which she presented her version of relevant events. She stated that when she took one week off for mononucleosis in June 2001, her supervisor, Roberta Silverman, stated her displeasure. In October and December 2001 and February 2002, she asked Silverman to allow her to work from home one day a week to limit her hours. Silverman refused. In December 2001, March 2002, and May 2002, she asked Silverman to have a sofa in her office to rest. Silverman refused. In April 2002, she asked defendant's president, Lynne Doll, to allow her to work at home one or two days a week, or to change her status to that of an independent contractor, and in February 2002, she spoke to Doll about changing conditions to reduce stress. Doll refused her requests. In June 2002, after granting plaintiff sick time under the CFRA, Doll told plaintiff that she would not hold her job open. However, in July and August 2002, Silverman repeatedly called plaintiff and pleaded with her to come back to work immediately because of an overload of work. Plaintiff suggested working part time. On August 27, 2002, Silverman refused.

This evidence is sufficient to raise a triable issue as to the first two elements of the continuing violations doctrine, i.e., whether the alleged denials of accommodation in July 2001 and February 2002 were part of a series of such

denials reasonably similar in kind and occurring with reasonable frequency. Defendant contends, however, that plaintiff cannot meet the third element of the doctrine – that the denials of accommodation had not reached a degree of permanence. According to defendant, plaintiff failed to show any conduct by defendant that might reasonably convey a willingness to give her an accommodation. Defendant overlooks plaintiff's evidence that defendant gave her medical leave in June 2002 because of her condition, and that Doll told her defendant would do what the law required (though Doll would not promise to hold her job open). Defendant also overlooks plaintiff's evidence that in August 2002, because of a surplus of work, Silverman (her supervisor) was pleading to have her come back to work. If true, plaintiff's evidence is sufficient to raise a triable issue whether a reasonable employee, having been granted medical leave, having been informed that defendant would do what the law required, and having been informed of defendant's urgent need of plaintiff's assistance, would have understood that further requests for accommodation would be futile before Silverman's final refusal on August 27, 2002.

We conclude, therefore, that a triable issue exists as to whether the continuing violations doctrine applies and whether, therefore, plaintiff exhausted her administrative remedy as to her allegations in her civil complaint of failures to accommodate in July 2001 and February 2002.

c. *Qualified Employee – After Medical Leave*

Defendant contends that plaintiff's accommodation claims must fail, "because defendant did not have an obligation to accommodate [her] while she was on leave and up until the time of her discharge since she could not perform her job with or without accommodations." California law is in conflict whether the ability to perform the essential functions of the job with a reasonable accommodation is

required to assert a claim for failure to accommodate under section 12940, subdivision (m), and failure to engage in an interactive process under section 12940, subdivision (n). (See *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 977-978, 982, 985 (*Nadaf-Rahrov*) [liability under subds. (m) and (n) requires plaintiff to show that a reasonable accommodation could have been made, i.e., one that enables the employee to perform the essential functions of the job]; compare *Bagatti, supra*, 97 Cal.App.4th at pp. 360-361, fn. 4 [liability under subd. (m) does not require plaintiff to prove ability to perform essential functions of the job]; *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 425 [subd. (n) imposes liability even if a reasonable accommodation does not exist].)

Without belaboring the point, we agree with the reasoning of *Nadaf-Rahrov, supra*, that to state a prima facie case under section 12940, subdivisions (m) and (n), the employee must show that a reasonable accommodation existed. A contrary interpretation would produce anomalous results, inconsistent with legislative intent. For instance, "an employer could be held liable [under subd. (m)] for failing to accommodate an employee even if it engaged in a good faith interactive process and determined no accommodation was possible that would enable the employee to perform the essential functions of the position the employee held or desired." (*Nadaf-Rahrov, supra,* 166 Cal.App.4th at p. 976.) Similarly, the employer could be held liable under subdivision (n) for failing to engage in an interactive process to find a reasonable accommodation even if the evidence conclusively proved that such a process was futile because no accommodation was possible. (*Id.* at p. 980.) We agree with *Nadaf-Rahrov* that such results are inconsistent with analogous federal regulations, California legislative history, and a reasonable, common sense interpretation of the relevant statutes.

To the extent plaintiff bases her accommodation claims on defendant's failure to accommodate her disability or engage in an interactive process during and after her medical leave, she failed to raise a triable issue whether she could have performed the essential functions of the job with a reasonable accommodation. Defendant presented evidence that plaintiff was totally disabled from the beginning of her 12-week CFRA medical leave and was never certified to return to work. On November 20, 2002, plaintiff's physician, Dr. Stuart L. Silverman, certified that plaintiff was totally disabled as of June 12, 2002. This certification was given in connection with plaintiff's claim for disability benefits from her retirement plan. On March 16, 2003, Dr. Silverman wrote a report concluding that plaintiff "is totally disabled due to her fatigue and cognitive problems. . . . She is not able to return to work on any basis because her unpredictable fatigue and cognitive problems and other symptoms would substantially interfere with her ability to continuously productively work for a predictable period of time." At her deposition on September 15, 2005, plaintiff testified that she had been medically unable to work since going out on medical leave in June 2002, and that she had never been released by her physician to return to work. She had not been employed since being terminated by defendant. She had not looked for work because her "fatigue is still very high." She and her current physician, Dr. Daniel J. Wallace, "agree[d] that it [was] not time for [her] to look for work."

This evidence shifted the burden of production to plaintiff to prove that at the conclusion of her medical leave she was capable of performing the essential functions of her job with reasonable accommodation. To do so, plaintiff relied on her own declaration and that of her then-current physician, Dr. Daniel J. Wallace. In her declaration, plaintiff stated that she fully anticipated returning to work on September 5, 2002, that she could have returned with a reasonable

accommodation, and that she would have returned if defendant had offered any accommodation. These bare assertions establish only that plaintiff believed she could have returned to work with some unstated accommodation. They do not dispute defendant's evidence (including plaintiff's own deposition testimony) that she was medically unable to work after June 2002 and was never released to return to work under any condition.

Dr. Wallace's declaration, dated April 3, 2006, fares no better. He stated that plaintiff "continues to suffer with fibromyalgia and chronic fatigue/immune deficiency syndrome" and "remains totally disabled." However, he also stated that she retained "the capacity to work on a freelance basis as her symptoms allow, with the necessity of resting when needed, working from home when needed, and avoiding excessive stress." Though artfully phrased, Dr. Wallace's April 2006 diagnosis does not release plaintiff to return to work. It also does not truly posit any reasonable accommodation. Dr. Wallace states that plaintiff could "work on a freelance basis as her symptoms allow," meaning that she had to rest "when needed," had to work from home "when needed," and had to avoid "excessive stress." But he gives no indication as to the likely frequency of occasions on which plaintiff would have to rest or work from home. He also gives no indication whether, with the need to avoid "excessive stress," plaintiff could actually perform the essential functions of her job consistently and predictability. Indeed, it is difficult to see how Dr. Wallace's diagnosis truly differs from that of Dr. Silverman: that plaintiff was totally disabled and "not able to return to work on any basis because her unpredictable fatigue and cognitive problems and other symptoms would substantially interfere with her ability to continuously productively work for a predictable period of time." In any event, even if Dr. Wallace's declaration can be construed to suggest that a reasonable

accommodation existed as of April 2006, it fails to show that such an accommodation existed as of August 2002 when plaintiff was terminated.

Thus, we conclude that plaintiff failed to raise a triable issue whether, at the time she was terminated, she could have performed the essential functions of her job with a reasonable accommodation. To the extent her accommodation claims rest on defendant's conduct during and after her 12-week medical leave, defendant had no duty during that period to grant a reasonable accommodation under section 12940, subdivision (m), or to engage in an interactive process under section 12940, subdivision (n).

d. *Qualified Employee -- Before Medical Leave*

Plaintiff's failure to raise a triable issue whether she could perform the essential duties of her job after taking medical leave does not dispose of her accommodation claims in their entirety. Plaintiff presented evidence of defendant's failure to accommodate and failure to engage in an interactive process beginning in July 2001 and occurring up to the date she took medical leave. She also presented evidence that she could have continued working during that period with accommodation. One of the theories supporting plaintiff's accommodation claims, articulated in her complaint and supported by evidence in opposition to summary judgment, was that defendant's repeated failure to accommodate her beginning in July 2001 exacerbated her disability, causing the need for her medical leave and culminating in her becoming totally disabled. Thus, regardless of whether defendant had the duties to offer a reasonable accommodation and conduct an interactive process after plaintiff took medical leave, plaintiff raised a triable issue whether defendant had such duties, and performed them, *before* plaintiff became totally disabled and took medical leave. On this theory of liability, plaintiff's accommodation claims remain viable.

Defendant contends that this theory of liability is newly minted on appeal, and was not presented in the trial court. We disagree. Plaintiff alleged in her complaint that defendant's failures to accommodate and to engage in an interactive process her exacerbated her condition. She presented evidence of that fact in opposition to summary judgment. Section 12940, subdivisions (m) and (n), impose liability on an employer for any damage caused by a failure to accommodate and failure to engage in an interactive process. (See *Bagatti, supra*, 97 Cal.App.4th at p. 357 [referring to subd. (m).]) The exacerbation of defendant's condition, if true, is clearly damage within the contemplation of the accommodation claims as pled and as described in opposition to summary judgment. Thus, this theory of liability is not new to this appeal, and may be pursued.

e. *Undue Hardship*

Section 12940, subdivision (m), provides that the employer is not required to adopt an accommodation "that is demonstrated by the employer . . . to produce undue hardship to its operation." On appeal, defendant contends that plaintiff's requested accommodation of working from home one day a week would have caused an undue hardship. Defendant relies on the declaration of Elliott Fils, its chief financial officer. Fils stated that allowing plaintiff to work from home would have created an undue hardship on defendant, which would have had to spend substantial funds to create a home office for plaintiff and to connect plaintiff's home to defendant's server and telephone system. Further, the operation of plaintiff's team required that she be in the office to meet clients, supervise employees, develop business strategies, and attend business meetings. No other account supervisors were permitted to work at home on a scheduled basis.

Plaintiff, however, presented evidence tending to show that working at home would not have caused an undue hardship to defendant. In her declaration, she stated defendant permitted other employees, including account supervisors, account executives, the president and vice-presidents to work from home. Further, because plaintiff "was already networked from home to the office," permitting her to work from home would not have resulted in any cost to defendant. Plaintiff also stated that she could have done more than half of her duties from home and completed the rest at the office. This evidence is sufficient to create a triable issue whether permitting plaintiff to work from home one day a week would have cause an undue burden to defendant.

We conclude that plaintiff raised a triable issue whether her requested accommodation of working at home one day a week would cause defendant an undue hardship.

f. *Conclusion*

As to plaintiff's accommodation claims, we affirm the trial court's ruling insofar as it summarily adjudicated those claims in relation to defendant's alleged violation of its duties under section 12940, subdivisions (m) and (n), after plaintiff's June 2002 medical leave. We reverse insofar as the court adjudicated the accommodation claims for violation of those duties before plaintiff's medical leave.

2. *First Cause of Action for Disability Discrimination*

In her first cause of action for disability discrimination, plaintiff alleged that "[d]efendant violated . . . section 12940, subdivision (a), by discharging plaintiff on the basis of her physical disability and by denying her request to modify her work schedule and/or work location." In relevant part, section 12940, subdivision

(a), makes it an unlawful employment practice for "an employer, because of . . . physical disability, mental disability, [or] medical condition . . . of any person, . . . to discharge the person from employment . . . , or to discriminate against the person . . . in terms, conditions, or privileges of employment." (See *Nadaf-Rahrov, supra*, 166 Cal.App.4th at p. 964.) Such a claim requires proof that the employee was discharged or discriminated against because of a disability, and that the employee could perform the essential functions of the job with or without accommodation. (*Ibid.*) The employer may rebut such a showing by offering evidence that the employee's termination or other treatment was motivated by a legitimate, nondiscriminatory reason. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355-356 (*Guz*).) If the employer sustains this burden, then plaintiff must show that the employer's stated reason was a pretext for discrimination. (*Id.* at pp. 356, 360.)

Like plaintiff's accommodation claims, her disability discrimination claim actually encompasses two periods: first, defendant's alleged discrimination in the conditions of her employment by failing to grant her accommodation requests in July 2001 and February 2002; and, second, defendant's alleged discrimination by denying her accommodation requests in July and August 2002 while she was on medical leave and thereafter terminating her.

To the extent plaintiff's disability discrimination claim is based on defendant's failure to accommodate her up to the time of her medical leave in June 2002, our prior discussion reversing the summary adjudication of her accommodation claims applies. Therefore, summary adjudication of that theory of liability was inappropriate.

However, to the extent plaintiff's disability discrimination claim is based on defendant's refusal to permit her to come back to work following the end of her medical leave in September 2002, we conclude that the trial court properly

adjudicated the claim for two reasons. First, as we have discussed in analyzing plaintiff's accommodation claims, plaintiff failed to raise a triable issue whether she could perform the essential functions of her job after she took medical leave in June 2002. On this ground alone, her discrimination claim (to the extent it is based on defendant's failure to permit her to return to work) cannot stand.

Second, we conclude, as did the trial court, that defendant had a legitimate, nondiscriminatory reason for terminating plaintiff, and that plaintiff failed to raise a triable issue on that ground. Defendant produced evidence that plaintiff's termination resulted from a workforce reduction dictated by a downturn in business, and plaintiff failed to raise a triable issue that this stated reason was a mere pretext for discrimination. Therefore, the trial court properly adjudicated this latter theory of liability in defendant's favor.

a. *Legitimate, Nondiscriminatory Reason*

In support of its contention that it had a legitimate, nondiscriminatory reason for terminating plaintiff, defendant relied primarily on the declaration of Elliott Fils, defendant's chief financial officer. According to Fils, gross revenue for the company declined 12 percent in the last six months of 2002, and a total of 17 percent for the entire year. On August 20, 2002, Fils and the other shareholders of the company decided to make a reduction in workforce which ultimately included five people, three of whom came from the team of which plaintiff was a member (defendant serviced its advertising accounts by assigning them to specific teams of employees). Projects of four clients serviced primarily by plaintiff's team ended and the revenue was not replaced. The remaining clients serviced by plaintiff's team did not generate sufficient revenue to support the team. For each client, defendant calculated a ratio, or "multiple," of revenue against salary by dividing the total of that client's revenue by the total salary costs attributable to the account.

The "multiples" for the clients serviced by plaintiff's team ranged from .33 to 2.77, far below the industry standard of 3.5. Defendant's goal was to reach a multiple of 3.5 for each client. Because plaintiff's team did not reach that level, defendant selected three members from that team -- plaintiff and two others -- for layoff. In all, five persons were laid off, including a vice president, three account supervisors, and one accounting clerk. Fils attached documents to his declaration substantiating the company's financial distress, including defendant's financial statements for 2000 through 2002 and revenue and profitability reports.

This evidence of a legitimate, nondiscriminatory reason for plaintiff's termination shifted the burden to plaintiff to produce evidence that defendant's reason was a mere pretext for disability discrimination. (*Guz, supra, 2*4 Cal.4th at p. 360.) None of plaintiff's evidence raised a triable issue on this point.

In her declaration in opposition to summary judgment, plaintiff stated that none of the other employees laid off on *August 20, 2002*, worked in her group. But this statement does not actually contradict Fils' statement that two other members of plaintiff's team were terminated in the workforce reduction. Plaintiff was the *only* employee notified of the impending termination on August 20, 2002. Fils explained that because plaintiff was already on medical leave, Fils and other senior managers gave her early notice on August 20, 2002, of her termination (scheduled to take effect on September 5, 2002). They were concerned that if she were terminated before she applied for disability insurance coverage, she might be rendered ineligible. After speaking with the insurance carrier, defendant learned that plaintiff's coverage was not in jeopardy. Not until September 4 and 5, 2002, did defendant contact each of the other persons who were laid off. Thus, plaintiff's claim that no one else in her group was terminated on August 20, 2002, is meaningless – it does not dispute the fact that two other members of her team were terminated as part of the same reduction in work force.

Even more telling, in her deposition testimony (in a page she cites in opposition to summary judgment) plaintiff *conceded* that she knew before she filed her civil complaint that two members of her team, Barry Liden and Diane Greenwood, were laid off at the same time she was. Thus, her evidence does not truly dispute that the downsizing included two members of her team.

In her declaration, supplemented by her deposition testimony, plaintiff stated that there was no downturn in work, but rather a shifting of tasks, as shown by the transfer of some members of her team to other teams. She conceded, however, that whereas in 2001 defendant employed approximately 90 employees, it employed only 70 people in 2002, a decline of 22.2 percent in personnel and wage burden. Thus, it is apparent from her own evidence that the "shifting" of personnel to which she referred coincided with an overall reduction in workforce. Moreover, a shifting of certain personnel, coinciding with the lay offs plaintiff concededly knew about, is consistent with defendant's evidence of its financial downturn.

Plaintiff produced evidence that in the first four months of 2002, her work generated more than $99,000 in revenue and in 2002 her accounts included 10 accounts that generated more than $400,000 in revenue. This evidence, however, does not dispute the evidence that defendant's gross revenue decreased 12 percent in the last six months of 2002, and a total of 17 percent for the entire year.

Relying on documents submitted with Fils' declaration, plaintiff contends that the revenue of the accounts lost by her team was more than made up by two new accounts. The relevant documents reveal, in substance, that the four accounts

lost by plaintiff's team generated $108,239 in revenue in 2002.[8] One new account serviced by plaintiff's team, Bandai, generated a total of $145,596 in 2002, and another new account, LA Airport Anniversary, generated $33,933 for that year. According to plaintiff, the Bandai account alone generated more income than all the lost accounts, and the two new accounts combined generated $179,529. Therefore, plaintiff asserts, defendant's stated reason for terminating her – that the revenue of the lost accounts could not be recaptured – was false.

Plaintiff's contention relies on at least two false premises. First, not all of the Bandai revenue was attributable to plaintiff's team. Fils' explained that another team was also working on the Bandai account, and that therefore not all of Bandai's revenue could be credited to plaintiff's team. Indeed, plaintiff essentially concedes the point, because she cites deposition testimony by Lynne Doll, defendant's President, in which Doll stated that in August 2002 plaintiff's team was combined with another team that was already servicing the Bandai account.

Second, the decision to reduce the workforce was made on August 20, 2002. At that time, Fils and other shareholders examined the *projected* revenue generated by clients (obviously, the ultimate year-end figures were not available). Those estimates were provided by the team leaders based on the outstanding workload in the client budgets and the approved hourly rates for those clients. As of August 20, 2002, the projected revenue attributable to plaintiff's team from the Bandai account was only $29,000.

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[8] The four lost accounts were identified as W.L. Gore, Gas Co., Sunset & Vine, and LA Airport Public Awareness Program. W.L. Gore generated $4,049 in June 2002, $15,770 in July, $40,383 in August, and $688 in September, for a total of $60,890. Gas Co. generated $19,774 in 2002, all but $1,125 occurring by August 2002. Sunset & Vine generated $19,000, all in June. LA Airport Public Awareness Program generated $8,575, all by March 2002.

Thus, because plaintiff's team could not claim the entirety of the Bandai revenue, and because the decision to reduce the workforce was of necessity based on projected rather than actual revenue, plaintiff's interpretation of defendant's statistics does not create a triable issue whether, when the decision to terminate plaintiff and two others on her team was made, the accounts lost by that team could not be replaced by revenue from other clients. Moreover, plaintiff fails to dispute another key aspect of defendant's evidence supporting her termination, namely, that the multiples of revenue as against salary for plaintiff's team was far below industry average, leading defendant to lay off three members of the team, including plaintiff.

Trying to show a discriminatory motive for her termination, plaintiff points to a portion of Doll's deposition testimony. In that portion, Doll explained that in conducting the reduction in workforce "[w]e looked at every person and position in the agency. . . . [W]e wanted to make sure . . . that our staff who were key to accounts were being compensated so that they would remain and we could have some stability. At a time when the whole industry was laying people off and salaries were frozen in some companies, we thought it was wise to make sure that we looked at it not at an across-the-board decision, but as a situation that would ensure the continuity of our employees who were key to accounts and the stability of the accounts so that our revenue didn't drop further."

Plaintiff asserts that in referring to "stability" and "continuity," Doll was using "code wording for discrimination" based on her disability. Doll's testimony, however, cannot reasonably be construed as disclosing a discriminatory motive. Doll simply explained that in deciding whom to retain and whom to lay off, the company wanted to ensure it kept those persons who were important to servicing its accounts so as to maintain continuity in its business. No reasonable trier of fact

could conclude that Doll was using artful language to mask a discriminatory motive to terminate plaintiff.

Finally, plaintiff relies on the evidence of defendant's repeated refusals to accommodate her and defendant's failure to engage in an interactive process, including her evidence that in July and August 2002, Silverman repeatedly pleaded with her to come back to work because of an overload of work, but then refused her request to work from home one day a week. This evidence, however, is insufficient to reasonably dispute whether the documented downturn in defendant's business, including the loss of accounts serviced by plaintiff's team and the low ratios of revenue to salary, resulted in a reduction of workforce of which plaintiff's layoff was a nondiscriminatory part. As stated in *Guz, supra,* "summary judgment for the employer may . . . be appropriate where, given the strength of the employer's showing of innocent reasons, any countervailing circumstantial evidence of discriminatory motive, even if it may technically constitute a prima facie case, is too weak to raise a rational inference that discrimination occurred." (*Guz, supra,* 24 Cal.4th at p. 362.) Here, defendant's evidence of a legitimate, nondiscriminatory reason for plaintiff's layoff is particularly strong – indeed, essentially without dispute -- whereas plaintiff's evidence of pretext is, at best, weak. To reject defendant's showing, a reasonable trier of fact would be required to conclude that despite the uncontradicted evidence of defendant's decreasing profits, the accounts lost by plaintiff's team and the team's low multiples of revenue to salary, and the nondiscriminatory termination of four other employees (including a vice president and two other account supervisors), defendant also terminated plaintiff based on her disability. We conclude that no reasonable trier of fact could reach that conclusion. Therefore, the trial court properly adjudicated plaintiff's first cause of action for disability discrimination, to the extent it alleged a claim of disability discrimination based on plaintiff's termination.

3. *Fourth Cause of Action for Violation of the CFRA*

Plaintiff's fourth cause of action alleged that defendant violated the CFRA (§ 12945.2, subd. (a)) by refusing to allow her to return to work in retaliation for exercising her CFRA rights. Under the CFRA, as here relevant, an employee who suffers from a serious health condition that makes the employee unable to perform at least one essential job function is entitled to unpaid medical leave of up to 12 weeks during a 12-month period. Following the leave, the employee is entitled to return to the same or an equivalent position. (See *Neisendorf v. Levi Strauss & Co.* (2006) 143 Cal.App.4th 509, 516-517 (*Neisendorf*).) However, "[w]hile an employer's duties under the FEHA include extending reasonable accommodations to an employee if reasonable accommodations will enable the employee to perform his or her essential duties [citation], there is no similar provision in the CFRA requiring an employer to provide reasonable accommodation to an employee returning from CFRA leave." (*Id.* at p. 517.) Moreover, if the employer has a legitimate, nondiscriminatory reason for terminating the employee, the employee cannot state a claim under the CFRA based on the employer's refusal to reinstate the employee. (*Id.* at p. 520.)

As we have discussed in analyzing defendant's accommodation and disability discrimination claims, plaintiff was never certified to return to work following expiration of her 12-week CFRA leave, and she fails to raise a triable issue whether she then could have performed the essential duties of her job with a reasonable accommodation. Therefore, on this ground alone, her claim for violation of the CFRA fails – defendant had no obligation to allow her to resume her former position. (*Neisendorf, supra,* 143 Cal.App.4th at p. 518 [employee's claim that CFRA entitled him to return to work following leave "ignores the

critical fact that [the employee] was never released to return to work without restrictions"].)

Moreover, the trial court summarily adjudicated plaintiff's CFRA claim on the ground, in part, that defendant's work force reduction constituted a legitimate, non-discriminatory reason for terminating plaintiff. In challenging this ruling on appeal, plaintiff relies on the same arguments she presented in support of her first cause of action for disability discrimination. As we have explained in our discussion of that claim, however, plaintiff failed to raise a triable issue concerning whether defendant's downsizing its work force in the face of a business downturn was a pretext. The same analysis applies to plaintiff's CFRA claim. Therefore, we affirm the trial court's summary adjudication of plaintiff's fourth cause of action for violation of the CFRA.

4. *Fifth Cause of Action for Intentional Infliction of Emotional Distress, and Sixth for Negligent Infliction of Emotional Distress*

Because we reverse the trial court's ruling, in part, on plaintiff's accommodation claims and discrimination claim, we also reverse the summary adjudication of plaintiff's fifth cause of action for intentional infliction of emotional distress and sixth cause of action for negligent infliction of emotional distress. Defendant's alleged conduct in discriminating against plaintiff before she took medical leave in June 2002, and in denying a reasonable accommodation and in failing to engage in an interactive process during that time, is sufficient to create a triable issue on plaintiff's emotional distress claims.

DISPOSITION

The judgment is affirmed in part and reversed in part. On remand, the trial court shall vacate its prior order granting summary judgment. Insofar as the first, second, third, fifth and sixth causes are based on defendant's alleged violation

of its duties under section 12940, subdivisions (a), (m), and (n), before plaintiff's medical leave in June 2002, the court shall enter a new order denying summary adjudication. On plaintiff's fourth cause of action for violation of the CFRA, the new order shall grant summary adjudication for defendant. It shall also grant summary adjudication for defendant on plaintiff's first, second, third, fifth, and sixth causes of action, insofar as they are based on defendant's alleged violation of its duties under section 12940, subdivisions (a), (m), and (n) following plaintiff's medical leave in June 2002. Each side shall bear its own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.